THE CITY OF LOS ANGELES, [illegible]
vs.
LOS ANGELES CITY WATER COMPANY [illegible]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

J. S. CHAPMAN,
Of Counsel.

FILED NOV [illegible]

(17,214)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. MATTHUSS, *et al.*,

Appellants,

vs.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND AND WATER COMPANY AND S. G. MURPHY,

Respondents.

RESPONDENT'S BRIEF.

In view of the distance from the seat of government, the respondents have been compelled to begin the preparation of their brief in advance of receiving the brief on behalf of the appellants, and for that reason will preface their argument with a statement of the case so far as they deem it necessary to an understanding of the questions involved, saying no more, however, concerning the agreed statement of the facts upon which the case was heard, than merely to refer to it, and calling attention to such

portions as may be necessary, as we proceed with the points and authorities.

Statement of the Case.

On the 22nd day of July, 1868, the city of Los Angeles entered into a contract with J. S. Griffin, P. Beaudry and Solomon Lazard with respect to furnishing water to the inhabitants of the city of Los Angeles by the said parties, and which contract is set out in full in the bill of complaint filed herein. (Tr. p. 3-6, fols. 3-8.)

The principal provisions of this contract of consequence here are, that Griffin, Beaudry and Lazard agreed to pay to the city $1500 per annum, (*Id.* fol. 3, p 3), and surrendered to the city all claims that they then held againt the city for repairs of the said water works and damages, amounting to $8000, or a little more or less (fol. 4), and also should make, as it was said in this instrument, the following improvements about, in and upon the said water works at their own proper cost and expenses, to wit:

"Lay down in the streets of the city 12 miles "of iron pipes of sufficient capacity to supply "the inhabitants of said city with water for do- "mestic purposes, and should erect or cause to "be erected one hydrant to be used as a protec- "tion against fire, at one corner of each cross "street, of said city where the water pipes now "are or may hereafter be laid, by virtue of this "contract, and shall within one year from the "approval of the contract and ordinance, erect "or cause to be erected an ornamental fountain "upon the public plaza of said city, of such "design as the mayor and common council

"should direct, at a cost not to exceed one thou-
"sand dollars, and should, within two years,
"construct at their own cost and expense such
"ditches, flumes, or erect such machinery in
"connection with said water works as will secure
"to the inhabitants of said city a constant sup-
"ply of water for domestic purposes, and shall
"construct reservoirs of sufficient capacity for
"that purpose." (*Id*, fol. 4.)

Further along they agreed that they would make the improvements thereinbefore mentioned and set forth in the following manner, to wit:

"That they will replace all the wooden pipes
"now belonging to said waterworks within one
"year from the signing and approving of this
"contract and ordinance, and that they will ex-
"tend said iron pipes as fast as the citizens de-
"siring to be supplied with water for domestic
"purposes will agree to take sufficient water to
"pay ten per cent per annum interest upon
"the cost of extending said pipes through
"the streets now unsupplied with water. That
"they will within one year from the date hereof,
"place a hydrant to be used as a protection against
"fire at one corner of one street at each of the
"cross streets where the pipes are now laid, and
"will erect hydrants at other street corners ac-
"cording to the terms of this contract as fast as
"the pipes are extended through the streets of
"said city. That they will erect or cause to be
"erected an ornamental fountain upon the pub-
"lic plaza, of such design as the mayor and com-
"mon council shall direct, within one year from the
"date hereof. That they will furnish water for

"the public schools, city hospitals and jails, free "of charge, when the same are near the pipe, the "city furnishing the necessary conduits for that "purpose. That they will make all the improve- "ments herein mentioned and set forth and keep "the same in repair at their own cost and expense "for the said period of thirty years, and return "the said water works to the party of the first "part at the expiration of the said period of "thirty years in good order and condition, reason- "able wear, and the damage of the elements ex- "cepted, upon the payment to them of the value "of the improvements made after the approval "of this contract, to be ascertained as hereinbefore "provided, and to give a bond in the sum of "twenty thousand dollars, conditioned for the "compliance by them with the conditions of this "contract to be approved by the mayor of said "city; and will pay all state and county taxes "assessed upon the said waterworks during the "said period of thirty years." (Tr. p. 5, fols. 6-7).

The consideration which they were to receive for this undertaking was that the said party of the first part for the above considerations and one dollar in hand paid, covenanted and agreed with the said parties of the second part, their heirs executors, administrators or assigns, to deliver and concede to the said parties of the second part, their heirs, executors, administrators or assigns, the exclusive use, control, possession and management of the Los Angeles City Water Works, so-called, together with all and singular, the pipes, flumes, wheels and other personal

property, composing and appertaining to said water works, in any manner whatsoever, with all the rights, easements and privileges and covenants, as described and contained in a certain instrument of lease executed by the mayor and common council of the said city of Los Angeles, October sixteenth, A. D. one thousand eight hundred and sixty-five, to Jean L. Sansevaine, for the period of thirty years from the signing and approval of the contract and ordinance, with the right to sell and distribute water for domestic purpose, to receive the rents and profits thereof, for there own use and benefit, except as herein before provided, hereby giving and granting to the said parties of the second part, their heirs, executors, administrators or assigns, the right to lay pipes in any and all the streets of said city, and to dig and make all necessary excavations for that purpose, and the right of way through, upon and over lands or streets belonging to the said city of Los Angeles with the additional right to take water from the Los Angeles river at a point above or near the present dam; provided always that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from said river for the use of said water works more than ten inches of water, without the previous consent of the mayor and common council of said city; and that they will within sixty days from the date hereof, select the point from which the water will be taken from said river.

"The said party of the first part hereby "covenant and agree with the said parties of the

"second part, their heirs, executors, adminis-
"trators or assigns that at the expiration of
"the period of thirty years from the execution
" of this instrument, they will pay to the said
"parties of the second part, their heirs,
"executors, administrators or assigns the
"value of the improvements made in, about
"and upon the said waterworks in pursuance of
"this contract, the same to be ascertained by
"arbitration, in case the parties cannot agree
"upon the value thereof; the said party of the
"first part and the parties of the second part,
"their heirs, executors, administrators or
"assigns to choose one man each, and the two
"men thus chosen to select a third man, and
"the judgment of the three men thus selected
"shall be final in the premises. And the said
"party of the first part hereby covenant and
"agree to make no other lease, sale, contract,
"grant or franchise to any person or persons,
"corporation or company, for the sale or the
"delivery of water to the inhabitants of said
"city, for domestic purposes, during the con-
"tinuance of this contract, always without pre-
"judice to any rights already granted." (Tr.
"fols. 4-6)

At another part of the contract, there is this provision:

"Always provided that the mayor and com-
"mon council of said city shall have and do
"reserve the right to establish the water rates
"charged by said parties of the second part or
"their assigns, provided that they shall not so
"reduce such water rates or so fix the price

"thereof to be less than those now charged by "the parties of the second part for water; pro- "vided that a certain contract of lease hereto- "fore executed by the mayor and common "council of said city to Jean L. Sansevaine of "said waterworks of date October sixteenth, A. "D. one thousand eight hundred and sixty-five "be surrendered and cancelled up at or before "the signing of this contract; provided always "that the rights and privileges by these pre- "sents conceded to said parties of the second "part, do not embrace, to any extent, or have "any reference to the water works of said city "used for the distribution of water for the pur- "poses of irrigation, or affect in any manner "any rights of irrigation, either existing at "present, or which may exist hereafter, except "as to the ten inches of water as hereinbefore "provided. And it is expressly stipulated and "covenanted that said parties of the second "part shall not dispose of any water for the "purposes of irrigation, but shall only take "from said river the water necessary for domes- "tic purposes, as above specified." (Tr. fols. 7-8.)

It is alleged that the contract of said Sansevaine was surrended as agreed (Tr. fol 9, par. 9, of the bill) and that on the 19th of April, 1870, Griffin, Beaudry and Lazard assigned the contract, for a valuable consideration, to the Los Angeles City Water Company, one of the plaintiffs below. It is then alleged that Griffin, Beaudry and Lazard, and its assignee, the Los Angeles City Water Com-

pany, have performed all the terms and conditions of the contract on their part to be performed; and further alleged that at the time of the making of the contract, the city of Los Angeles was a small town, having not more than five or six thousand inhabitants, nor more than two or three miles of graded streets; but that since the execution of the agreement it had increased in population until there were about seventy-five thousand inhabitants, exclusive of the territory that had been recently incorporated into the city; that buildings of all kinds, business blocks, manufacturing estabments and residences had been constructed in all parts of the city, and the number of houses of all kinds "now being in the said city" was probably at least fifteen thousand; that there had been constructed, for the convenience and use of the inhabitants, since the execution of this contract, about forty school houses for use as public schools, and all other kinds of buildings, hotels, city halls, jails, county court houses, theaters, pavilions and all sorts of edifices; that the street railways and steam railways have increased in number and the extent of their mileage, until there are now probably seventy to one hundred miles of street railways laid in the city, and now being operated, and about seventy five to one hundred miles of graded streets; that parks have been laid out and improved and the increased demand for water in said city had been in greater proportion since the said contract was made and assigned to the said Los Angeles City

Water Company than the increase in population. (Tr. fols. 9-10.)

It was alleged that the Los Angeles City Water Company had extended the iron pipes provided for in said contract as fast as the people of Los Angeles desired to be supplied with water for domestic purposes, and would agree to take sufficient to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets which were at that time unsupplied with water, and that to obtain a supply of water over and above the said ten inches, the company had been compelled to expend a large amount of money, to wit: more than two millions of dollars, in laying down pipes in the streets of said city, to furnish the inhabitants thereof with water, and to furnish water to the city for its public schools, city hospitals and jails, and had laid down over and above the twelve miles of iron pipes mentioned in the contract, about three hundred miles of iron pipe, to be used for those purposes. (Tr. fol. 10.)

It is then alleged:

"That the ten inches of water leased by the "city from the Los Angeles river had long ago "become wholly insufficient to supply the in- "habitants with water; that it had become neces- "sary for the reasons set forth in the complaint "to change the point of diversion, and that the "company had, at immense outlays of money, "purchased the system that was established by "Prudent Beaudry, and known as the 'Beaudry "System of Water Works,' and also the system "established by the East Side Spring Water

"Company, and had purchased, and then held, "certain water rights in the Arroyo Seco, a "stream flowing into the city of Los Angeles "from the northeastern side, and had conducted "the water from the Arroyo Seco into the said "city, and on the eastern side of the Los Angeles "river for the supply of the inhabitants of that "portion of the city; and that the system of "works and water rights are now being used and "operated by said Los Angeles Water Company, "for the purpose of furnishing the city of Los "Angeles and its inhabitants with water, under "the provisions of the contract." (Fols. 10-11.)

It is then alleged in the bill that "about the "22nd of March, 1843, Manuel Micheltorea, then "being the governor of both the Californias, "granted to Maria Ygnacio Berdugo, a certain "tract of land to the north of the city, known as "the Rancho Los Felis, which grant was pre-"sented to the Board of Land Commissioners, "and on the 28th of February, 1854, the claim "was confirmed by that board, and a decree of "confirmation was confirmed by the District "Court of the United States for the Southern "District of California, at its December term, in "1856, and the grant decreed to be good and "valid; that the appeals taken from that decree "were dismissed and proceedings were had under "it and a patent issued on the 18th day of April, "1871." (Tr. fols. 11-12.)

Then follow allegations of a grant by the Spanish government made in 1784 of a certain tract of land to the north of the city, known as the San Rafael Rancho, of the presentation of a

petition for the confirmation of that grant, the confirmation by the Board of Land Commissioners on the 11th of September, 1855, and by the United States District Court on the 4th of June, 1857, and the issuance of a patent on the 28th of January, 1882. (Fols. 12-13.)

It was also alleged that the Los Angeles City Water Company had acquired a tract of land, part of the Rancho Los Felis, and which was known as the Crystal Springs Tract, and had cut a ditch from said Crystal Springs to divert water therefrom to increase the supply of water for the city; that subsequently, the Crystal Springs Land and Water Company was organized, and that tract was conveyed by the Los Angeles City Water Company to the Crystal Springs Land and Water Company, and that the latter company had acquired by purchase from the owners of the remainder of the Los Felis Rancho and from the owners of portions of the San Rafael Rancho the right to enter upon the lands, part of those grants, to develop and collect the percolating waters in the soil upon the said ranchos, and within the said tracts, and that that company did, at enormous expense, make excavations and lay pipes within the said portions of the Los Felis and San Rafael ranchos, and did develop of the percolating waters in said soil about 700 inches, measured under a four inch pressure, which were conducted by the Crystal Springs Land and Water Company to a point connecting the conduits with the system of water works owned by the Los Angeles City Water Company, and that the Crystal

Springs Land and Water Company had become vested with a right to make the said excavations, and to own, take, divert and use the waters which they might by the said work develop and by said pipes divert; and having acquired these waters, the Crystal Springs Land and Water Company did lease to the Los Angeles City Water Company the 700 inches of water, with the right to take the same through the system of works owned by the Los Angeles City Water Company, and supply the inhabitants of the city with the said water; and the Los Angeles City Water Company agreed to pay to the Crystal Springs Land and Water Company 25 per cent. of the gross amount received by it for rates collected within the said city of Los Angeles, for the rent thereof. [Fols. 13-14.]

That at the time these developments were made by the Crystal Springs Land and Water Company, and the conduits constructed, the city had increased in population to such an extent that the acquisition of further water was necessary to enable the Los Angeles City Water Company to perform its contract. [Fol. 14, Par. 14 of the Bill.] That the two companies had, in these developments and constructions, expended about three millions of dollars. [*Id.* Fol. 15.] That these corporations had contracted a bonded indebtedness of $409,000, and had conveyed to S. G. Murphy, one of the plaintiffs below, the properties and water rights in trust to secure the payment of the said bonded indebtedness to the holders of the said bonds,

and that said Murphy still holds the property under a deed of trust, to secure the said bonded indebtedness, which was still outstanding and unpaid. And the Los Angeles City Water Company still holds a lease from the Crystal Springs Land and Water company; that the company was still furnishing the city with water for municipal purposes, free of charge, and its inhabitants with water, for rates. (Fol. 15–16.)

It was further alleged that the same difficulty occurring in the year 1870 concerning what rates were charged for furnishing water to the inhabitants of the city at the date of the contract of July 22, 1868, commissioners were appointed by the city for the purposes of ascertaining and determining that amount, and after an investigation and examination the committee reported and the council accepted the rates set forth in the bill as being the rates charged at the date of the contract; and that it was agreed between the two, that is, the city and the water company, that those rates, thus ascertained by the commissioners, should be aecepted as the rates to be charged by the Los Angeles City Water Company, under the said contract. (Fol. 16, par. 17 of the bill.)

Then is set forth the rates which were thus determined, found on pp. 12–14, fols. 16–19.

It is then alleged that the legislature of the state of California ratified the contract between the city and Beaudry, Griffin and Lazard, by an act approved April 2, 1870, entitled, "An act to ratify certain acts and ordinances of the mayor

and common council of the city of Los Angeles;" and that the same was still in force; that the rates agreed upon by the parties were the rates that were charged at the time of the making of the contract. (Tr. fol. 20, par. 18.

It is then alleged that the city has ever since the making of the contract and the assignment thereof to the Los Angeles City Water Company, recognized its existence, and in every year demanded that the Los Angeles City Water Company perform the various terms and conditions of the said contract on its part, and demanded the erection of fire hydrants at the street corners, and which demands were continued up to the time of the commencement of the action; and that the fire hydrants were demanded at the same time of the passage of the ordinance fixing the rates to be charged by the Los Angeles City Water Company, in the year 1897, and that the company had been, during all the time, and was then, upon the demands of the city, and in accordance with the contract, furnishing water for sprinkling the streets of Los Angeles city, and for all the public uses therein mentioned, free of charge, and the city had been accepting the same by making use of the water so provided, without paying or offering anything therefor; and that the water company had recognized the contract obligation to do and perform all of said things under the said contract. (Tr. fols. 20-21.)

It was further alleged that the water company had no income or revenue from any other source than from these water rates, and was unable to

pay the rental agreed upon, to the Crystal Springs Land and Water Company, nor to continue to extend its pipes, and improve its system to meet the needs of the city, which was then growing at an enormous rate,and that it had been compelled to expend, within the last three years more than $400,000 in laying larger pipes and extending its pipe system to tracts that had before been unsupplied with water, and that its sole source of revenue, with which to pay for such improvements, repairs, maintenance and expenses of administering the system and to pay interest on the bonds issued by it, for the money borrowed for such improvements, expenses, maintenance and repairs, was from these water rates. (Tr. fols. 21-22.)

It is then alleged that in the year 1879, the people of the state had adopted a constitution to take effect on and after the 4th day of July,1879,so far as the same related to the election of officers, and for all other purposes, to take effect on the first day of January, 1880, at 12 o'clock meridian. By the said constitution, it was provided in Art. XIV, as follows, to wit:

"Article XIV. Section 1. The use of all "water now appropriated or that may hereafter "be appropriated, for sale, rental or distri-"bution, is hereby declared to be a public use "and subject to the regulation and control of "the state, in the manner to be prescribed by "law; provided that the rates or compensation to "be collected by any person, company or cor-"poration in this State for the use of water

"supplied to any city and county, or city or "county, or the inhabitants thereof, shall be "fixed annually by the board of supervisors, or "city and county, or city or town council, or "other governing body of such city and county, "or city or town, by ordinance, or otherwise, in "the manner that other ordinances or legisla- "tive acts or resolutions are passed by such "body, and shall continue in force for one year "and no longer. Such ordinances or resolu- "tions shall be passed in the month of Febru- "ary of each year, and take effect on the first "day of July thereafter. Any board or body "failing to pass the necessary ordinances or "resolutions, fixing water rates, where neces- "sary, within such time, shall be subject to "peremptory process to compel action, at the "suit of any party interested, and shall be "liable to such further processes and penalties "as the legislature may prescribe. Any per- "son, company or corporation collecting water "rates in any city and county, or city or town "in this state, otherwise than as so established, "shall forfeit the franchises and water works "of such person, company or corporation, to "the city and county, or city or town, where "the same are collected for the public use.

"Section 2. The right to collect rates or "compensation for the use of water supplied to "any county, city and county, or town, or the "inhabitants thereof, is a franchise and ~~may~~ can "not be exercised except by authority of and in "the manner prescribed by law." (Tr. Fols. 22-23, Par. 21 of the bill.)

Then in the 22nd paragraph of the bill (Fols. 23-25), it is alleged that the legislature of the State of California at its session held in 1881, claiming to be authorized by the said provisions of the constitution so to do, passed an act entitled' "An act to enable the board of supervisors, town councils, etc., to perform the duties prescribed by section 1, of article XIV of the constitution, and prescribing the penalties for the non-performance of such duties". This act did, in its first section, declare that the town council, board of aldermen, or other legislative body of any city and county or city or town, were thereby authorized and empowered, and it was made their official duty to annually fix the rates that should be charged and collected by any person, company, association or corporation for water furnished to any such city and county, or city or town or the inhabitants thereof; and providing that the rate should be fixed at a regular or special session of such board or other legislative body, during the month of February of each year, and should take effect on the first day of July thereafter, and should continue in full force and effect for the term of one year and no longer. And such act further provided that such legislative body of any city and county, or city or town should require by ordinance or otherwise, at least thirty days prior to the 15th of January of each year, that any corporation, company or person supplying water to such city and county, city or town, or to the inhabitants thereof, should furnish to such board or other governing body,

in the month of January in each year, a detailed statement, verified by oath of the president and secretary of such corporation or company or of such person, as the case might be, showing the name of each water rate payer, his or her place of residence, and the amount paid for water by each of such water rate payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time.

And it further provided in the sixth section thereof as follows:

"Rates for the furnishing of water shall be "equal and uniform. There shall be no dis- "crimination made between persons, or between "persons and corporations, or as to the use of "water for private and domestic and public or "municipal purposes; provided, that nothing "herein contained shall be so construed as to "any person, company, association or corpora- "tion to charge any person, company, corpora- "tion or association anything for water fur- "nished them, when by any present law such "water is free."

And it was further provided in section 7 of the act as follows:

"Any person, company, association or "corporation charging or attempting to "collect from the persons, corporations "or municipalities using water, any sum "in excess of the rate fixed as herein- "before designated, shall, upon the complaint of

"such board of supervisors, town council, board "of aldermen, or other legislative body thereof, "or of any water rate payer, and upon convic- "tion before any court of competent jurisdic- "tion, shall forfeit the franchises and water "works of such person, company, association or "corporation to the city and county, city or "town wherein the said water is furnished and "used." (Tr. fol. 25.)

It was further provided in section 8 of the act that any board of supervisors or other legislative body * * * which should fail or refuse to perform any of the duties prescribed by the said act, at the time and in the manner thereinbefore specified, should be deemed guilty of malfeasance in office, and upon conviction thereof at the suit of any interested party, in any court of competent jurisdiction, should be removed from office. (Fol. 25.)

It was further alleged that in 1888, the electors of the city of Los Angeles, in pursuance of the provisions of the constitution of the State of California, authorizing them so to do, adopted a charter for said city, and that said charter was, under the provisions of said constitution, submitted to the legislature of the state of California for its approval, ratification and adoption, and the said charter was, on the 31st of January, 1889, adopted by the said legislature, and it thereupon became and ever since has been the charter of said city, and by section 193 of the charter it is provided as follows:

"The rates of compensation for the use of "water to be collected by any person, company "or corporation in said city shall be fixed annu- "ally by ordinance, and shall continue in force "for one year, and no longer, such ordinance "shall be passed in the month of February of "each year and take effect on the first day of "July thereafter. Should the council fail to "pass the necessary ordinance fixing the water "rates within the time thereinbefore prescribed, "it shall be subject to peremptory process to "compel action, at the suit of any party inter- "ested." (Tr. fols. 25–26.)

It was further alleged that at the time this contract was entered into, and at the time of the assignment of the same to the Los Angeles City Water Company, there was no law of the state of California, attaching or attempting to attach, to an overcharge for the water rates, the penalty of forfeiture of the property of said company, and no such condition or limitation was contained in the grant of the said franchise to the assignors of the said Los angeles City Water Company, nor did any such condition subsequent, for the defeating of the title to the property in such franchises and water works or forfeiting the same to the municipality, ever exist, prior to the adoption of the constitution aforesaid. (*Id.* fol. 26, par. 24.)

It was further alleged that the provisions of the constitution of the state of California attempting to confer upon the legislative body of the city of Los Angeles, the power to regulate the rates to be charged by the said Los

Angeles City Water Company so as to authorize them to make such regulations as to fix a lower rate than that charged at the time mentioned in the said contract, impaired the obligation of the contract, and were in violation of the provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts; and that the provisions of the said constitution and acts of the legislature were all in violation of the said provisions of the constitution of the United States prohibiting any state from depriving any person of life, liberty or property without due process of law, and prohibiting the said states from denying to any person within their jurisdiction, the equal protection of the laws, and that the attempt in the constitution and the act of the legislature to create a condition in the estate of the Los Angeles City Water Company, in its property, whereby its title is to be defeated, and which condition did not exist at the time it acquired the said property, and was not contained in the grant to its assignors, is an attempt to deprive the Los Angeles City Water Company of its property without due process of law. (Tr. fols. 26 27.)

It is then next alleged that the council of the city of Los Angeles did, at its meeting of February 23, 1897, pass an ordinance regulating the rates and compensations allowed to be claimed by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1897, and ending June 30,

1898, claiming authority under the provisions of the constitution of the state, and under the acts of the legislature of the state of California and the charter of said city, and by which ordinance the rates to be charged by the Los Angeles City Water Company were fixed at amounts far less than those charged at the date of the said contract, and which were before set forth in the bill, and the copy of the ordinance is set forth in full. (Tr. fols. 27-31; par. 26 of the bill.)

It was alleged that under these rates, the revenues of the Los Angeles City Water Company would be reduced more than 40 per cent below the amount which it would receive at the rates charged in 1868, for the same services, and its ability to make the necessary extensions, and construct the necessary improvements to meet the wants and keep up with the progress of the city, would be greatly impaired, and the amount of rent that the said Crystal Springs Land and Water Company would receive would be 40 per cent less than it is entitled to receive, and that its ability to pay the interest and maintain the operating expenses and repairs and improvements necessary for the proper administration of its system, and to comply with the contract made by its assignors with the said city of Los Angeles, would be greatly impaired, and the said company will not only be deprived of the revenues which it ought to receive, but will be unable to carry on its said business, and to properly perform the contract hereinbefore set forth and the terms thereof on its part to be performed. (Tr. fol. 31.)

It was further alleged that if, when the ordinance went into effect, the Los Angeles City Water Company, should attempt to charge more than the rates so fixed, that your orators are informed and believe, and therefore allege, that the city of Los Angeles would claim that the property of the Los Angeles City Water Company was forfeited to the city, and would attempt to enforce such forfeiture; and that your orators cannot maintain the rights which they possess under the said several contracts hereinbefore set forth, except at the peril of the loss of said property, and the certainty of their being greatly interfered with by the said city of Los Angeles, in their attempts to maintain and operate the same; that the matter in dispute, exclusive of interest and costs, exceeds the sum of $150,000; and there is a prayer for a decree that the ordinance passed February, 23, 1897, fixing the water rates to be charged by the Los Angeles City Water Company to the said city and to its inhabitants, is null and void, and that the same is in violation of the contract rights of the said Los Angeles City Water Company, and of these plaintiffs, and that the council be commanded to regulate the water rates to be charged by the said Los Angeles City Water Company, but in such manner and for such rates fixed by it as that they shall not so reduce such water rates, or so fix the prices therefor, as to be less than those charged at the time of the execution of said contract, and for a decree enjoining the council from fixing the said water rates at any less amount until the determination of the said contract,

and that your orators may obtain the relief prayed for, and all such further or other relief as the nature of the case may require. (Fols. 32-33, par. 28.)

The bill was filed March 4, 1897. (Tr. fol. 33); exceptions were filed to the bill of complaint by the city of Los Angeles, for expunging impertinent matter. (Tr. p. 25, fol. 36); exceptions were also filed by Herman Silver and others composing the council of the city of Los Angeles. (Tr. fols. 38 39.) The city of Los Angeles also demurred to the bill; (Tr. fols. 40-46); Herman Silver and the others composing the council, also filed a demurrer. (Tr. fols. 48-54.)

The court sustained the fourth and fifth exceptions to the bill, (Tr. fols. 55-56), and overruled the remainder; (Fols. 55-58), and see the amended order upon that subject. (Fols. 59-62.)

The court also overruled the demurrer of all the parties. (Fols. 63-66.)

The defendant, the city of Los Angeles, filed an answer, (Fols. 67-91) and the council also answered, (Fols. 92-116.) The replication was filed to both answers. (Fols. 117-120); all of which proceedings are briefly stated. (Fols. 121-123.)

The decree was entered June 20, 1898. (Fol. 124.)

The cause was, in truth, heard upon an agreed statement of the facts set forth in the transcript. (Fols. 181-258.)

The assignments of error are very voluminous, and are set forth in folios 261-279.

The opinion of the court on the final hearing of this cause will be found in the transcript, fols. 127-180, and does itself completely establish the conclusions reached.

Points and Authorities.

I.

The court did not err in overruling the exceptions taken by the appellants to the report of the special master on the exceptions to the bill of complaint. It will be observed that the court sustained the fourth and fifth exceptions to the complaint and overruled the remainder.

Tr. fols. 55-61.

This fourth exception was to paragraph XI wherein the complainants set forth the deraignment of the title of the Crystal Springs Land and Water Company; and the fifth exception was to paragraph XII of the bill, where the allegations are of the same character.

The first exception is to paragraph VIII, in which we set forth the conditions of the city at the time of the execution of the contract and of the increase in population and improvements of all kinds.

Fols. 9-10.

The second exception is to paragraph IX of the bill and which is of the same character.

Fol. 10

The third exception is to the tenth paragraph of the bill where it is alleged that the ten inches of water leased by the city of Los Angeles became wholly insufficient to supply the inhabitants of said city with water, and setting forth the outlays by the Los Angeles City Water Company in acquiring other works and water supplies.

Fols. 10-11.

The sixth exception is to paragraph XIII and the allegations of that paragraph relating to the organization of the Crystal Springs Company, and what it had done in the developing of water, and in making the lease to the Los Angeles City Water Company.

Fols. 13-14.

The seventh exception is to the whole of paragraph XIV, and the eighth to paragraph XV. These both relate to matters of the same character. They allege the increase in population of the city, the necessity for further improvements and further water supply, and the expenditures which had been made in order to construct and obtain a system of works and a supply of water to enable the company to carry out its contract.

Tr. fols. 14-15.

The ninth exception is to a portion of paragraph XVI.

Fols. 36-37.

And it is not very easy to determine from this transcript what portion of the 16th paragraph is supposed to be impertinent, but in truth none of it is. It alleges the contracting of the bonded indebtedness, and that to secure the payment of the same, a conveyance to one of the complainants, S. G. Murphy, was made of the properties and water rights, in trust, to secure the payment of that bonded indebtedness. It refers again to the lease from the Crystal Springs Land and Water Company, and the agreement of the Los Angeles City Water company to pay 25 per cent of its gross receipts from water rates as the rent. It alleges too the continued supply of the city of Los Angeles with water for municipal purposes, free of charge, and the performance of the contract on the part of the Los Angeles City Water Company through all the years that had passed over this agreement; the erection of fire hydrants and the extensions of the pipes; and this through the demands of the city itself; and that up to the filing of the bill, at least, it showed that the company was furnishing, and the city receiving, water for municipal purposes free of charge.

Fols. 15-16.

The tenth exception is to the whole of paragraph XIX. This is principally occupied with setting forth the recognitions of the contract and the assignment to the Los Angeles City Water Company, and the various acts of the city, the demands made upon the company and compliance therewith by the company, all of which

things were demanded because the contract provided for it, and were performed by the Los Angeles City Water Company for the same reason.

Tr. fols. 20-21.

The eleventh and last assignment of error is directed to a portion of paragraph XXVI of the bill, and again it is difficult to discover what portion is objected to. The paragraph is the one in which is set forth the ordinance passed in February 23, 1897, and which is attacked by the bill in this case, and the portion to which this exception is directed must be contained within the closing part of the paragraph, and after the signature of the clerk. As these words "and" and "receive," occur several times, we suppose the paragraph is just before the conclusion, where it is said "and the said company will not only be deprived of the revenues which it ought to receive."

Tr. fols. 36-39.

A glance at the bill in this case will show that none of these exceptions were ever well taken, and that they were properly overruled. But if they had ever possessed any merit, their usefulness has been entirely obviated by the stipulation of the parties. This cause was heard wholly upon an agreed statement of the facts which will be found set forth in Transcript folios 181 to 258, and many of the matters which are attacked in these exceptions, for impertinence, are agreed to in the case, and whether they are relevant and material, and what force they are to be allowed is to be determined upon

the merits of the case rather than upon the exceptions taken to the bill.

II.

The court did not err in overruling the demurrers filed to the bill on behalf of the city of Los Angeles and the council of said city. The demurrer of the city is set forth in folios 40 to 46, and of the councilmen from folios 48 to 54. They do not require a separate treatment, as they raise substantially the same questions. We shall not notice the first ground stated, viz: that the bill does not state such a cause, nor contain any matter of equity entitling the complainants, or any of them, to any relief against these defendants, for that question also is determinable upon the agreed facts in the case, as well as upon the allegations of the bill. The objection, however, made to the jurisdiction of the court over the subject matter and the parties we shall consider here.

Of course it would not have jurisdiction over the parties by reason of citizenship, but the controversy is one arising under the laws of the United States. The bill alleges the making of the contract; that, as a part of that contract, the city agreed not to fix the rates at less than the rates then provided; that the city had the power to make such a contract independently of any act of the legislature ratifying it; that it was subsequently ratified by the legislature; that it had been carried out in every particular by the company; and that both parties had been recognizing its existence and its validity until the period of thirty years had nearly elapsed. Then

we allege the adoption of the constitution in 1879 purporting to authorize the city council to fix the rates, the passage of an act of the legislature assuming to do the same thing, the adoption and ratification of a charter of the city of Los Angeles still essaying to vest this power in the the city, and the exercise of that power by the council, and the passage of an ordinance fixing those rates far below the contract rates, the council claiming the authority so to do under the constitution and laws aforesaid

This made a case for the jurisdiction of the Circuit Court, and it matters nothing how the controversy may be eventually decided, so far as the jurisdiction is concerned. Ordinances of the city passed in pursuance of legislative authority are laws of the state within the meaning of the constitutional provision prohibiting laws imparing the obligation of the contract.

Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S., 258, 265, 266.

Shively v. Bowlby, 152 U. S. 1.

In the last case cited, which was a writ of error to the Supreme Court of Oregon, this court sustained the jurisdiction upon the ground that a federal question was involved, but affirmed the judgment of the Supreme Court of Oregon.

In the first case cited, the court sustained the jurisdiction, but reached the conclusion that the municipal ordinance referred to did not impair the obligation of the contract.

See also Santa Ana Water Co. v. Town of Santa Buenaventura, 56 Fed, 339.

That case is very similar to the present; indeed in principle, it is not distinguishable at all. There the town of San Buenaventura of California entered into a contract with Arnaz, and others by which the board of trustees of that town granted the exclusive privilege of supplying water to the said town unto Jose de Arnaz and others, for the term of fifty years

One of the provisions of that contract was that the parties of the first part (namely, Arnaz and his associates), should have the unrestrained right to establish such rates for the supply of water to private persons, as they might deem expedient, provided that such rates be general.

Id. 341.

The ordinance of that town passed the 15th day of February, 1892, purported to fix the maximum rates for supplying water to the town and its inhabitants, which should be charged by complainant for the year beginning July 1, 1892, and ending June 30, 1893.

Id. 344.

The right to fix these charges was asserted by the board of trustees of the town under the provisions of the constitution of the state of California, and of the act of 1881, which we have before set forth, and Judge Ross in delivering the opinion said:

"It was to carry out these provisions of the "constitution that the legislature of the state "passed the act, approved March 7, 1881, and it "was in pursuance of these constitutional and stat-"utory provisions that the ordinance complained "of was enacted. It is clear that if the contract

"entered into between the town and Aranz and "his associates purporting to confer upon them "and their assigns the exclusive privilege of sup- "plying the town and its inhabitants with water "for fifty years from the date of its execution, "and to secure to them the unrestrained right to "establish such rates for the supply of water to "private persons as they might deem expedient, "provided such rates be general, was a valid con- "tract, and passed, by assignment, to the com- "plainant corporation, the obligation of that "contract was protected by the constitution of "the United States against impairment by any "act of the state, constitutional or statutory."

The learned Judge of the Circuit Court of the Ninth Circuit, for the Southern District of California, (Judge Ross) came to the conclusion that that contract was valid, and that this ordinance did impair its obligations, and overruled a demurrer to the complaint. But without considering the question of whether the contract was or was not valid, or whether the ordinance did or did not impair the obligation of the contract, it is obvious that the case stated by the bill here, as well as in that case, is within the jurisdiction of the Circuit Court.

Jurisdiction is the power to hear and determine; and where the power exists, it is not affected by the conclusions which the court may reach.

If the court below had been of the opinion that the ordinance complained of was not in violation of the contract and had so determined such determination would have been the exercise of jurisdiction, not a denial of it.

As to the third ground of demurrer that several distinct and independent matters and causes which have no relation to each other and in which, or the greater part of which, the defendant was in no way interested, etc.,

Fols. 40-41.

it is sufficient to say that those paragraphs of the bill in which the deraignment of the Crystal Springs Land and Water Company's title was set forth, were stricken out as impertinent under the exceptions of the defendant, it being considered by the court below that all that was necessary for the Crystal Springs Land and Water Company and Murphy to show was that they had an interest in the matters involved in this controversy, and that the deraignment of title was unnecessary. Those paragraphs being out of the bill, there is not anything in it in which the defendant is not interested, and the several plaintiffs, the Los Angeles City Water Company, the Crystal Springs Land and Water Company and S. G. Murphy, are all interested in the rates to be collected by the Los Angeles City Water Company under the provisions of that contract. However, as to the objection to the misjoinder of parties plaintiff, by the stipulation filed in this case, that question is waived.

The tenth paragraph of the stipulation,

Page 119, Fols. 196-197,

is that the defendants in the action waive all questions as to the proper joinder of Murphy and the Crystal Springs Land and Water Company with the Los Angeles City Water Com-

pany, as plaintiffs, and the introduction of any evidence, under the allegations made, as to the character and sources of the waters in the excavations made by the Crystal Springs Land and Water Company, and alleged in the said bill of complaint. And it is stipulated that any decree that may be entered in this case shall neither be conclusive upon the title of either party to the lands, rights of way, waters and water rights and easements of all descriptions mentioned in the bill of complaint herein, nor shall the decree be admissible in evidence in any other litigation between the plaintiffs and defendants, or any of them, upon the question of the title to the said properties, and the decree which may be entered herein shall contain a clause making such reservation. Such decree shall not, nor shall anything contained in this stipulation, be construed as binding or concluding any of the parties hereto in regard to any fact or matter except in regard to the validity of the contract set forth in the bill of complaint, and in regard to the relief expressly awarded by such decree, and said decree shall contain a provision to this effect. This stipulation does not deprive either party of the right of appeal."

Tr. fols. 196-197.

Now the decree entered in the case did follow this stipulation, and was that the contract, in so far as it provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid; that the ordinance of February 23, 1897, fixing the rates

for the following year, did reduce the water rates below those charged on the date of the contract, and impair the obligation of the contract, and that said ordinance was null and void. It was ordered, adjudged and decreed that said ordinance be and the same is hereby vacated, and set aside, and held for naught.

Then follows the portion of the decree made in pursuance of the stipulation that it should not be conclusive upon the title of either party to this suit to lands, rights of way, waters and water rights and easements of all descriptions mentioned the bill of complaint herein, nor shall the decree be admissible in evidence in any other litigation between the complainants and defendants, or any of the them, upon the question of title to said properties.

Tr. fols. 124-125.

In view of the agreed statement of facts and of this stipulation, and the form of the decree, the fifth ground of demurrer that the bill is vague and uncertain, if it ever had any merit, is waived by that stipulation. But it is submitted, in addition, that the bill never was vague or uncertain in any of the particulars set forth in the demurrer, at par. 5, fols. 41-43 of the transcript. They are nearly all constructed upon the notion that it was in some way or other incuumbent upon the complainants to show that the charges fixed by the council were unreasonable. That was not the theory of the bill at all. It was that the contract had provided that the rates fixed by the council should not be less than those charged at the date of

contract. That these ordinances did fix a less rate; that they were passed in pursuance of these constitutional and statutory provisions; and that it is a law impairing the obligation of the contract.

It is in the stipulation agreed, that if the rates so established by the council in 1870, and confirmed by the ordinances of the city hereinbefore set forth, were collected for the year beginning July 1st, 1897, and ending June 30, 1898, the revenue received by the Los Angeles City Water Company from said rates would be more than $50,000 in excess of the amount which would be received under the rates named in the ordinances of Feb. 1897, as set forth in the bill herein.

Tr. fols. 216-217, par. 33 of the agreed statement, p. 133.

Now those ordinances of 1870 and succeeding years will be found from folios 200 to 209, and the proceedings in regard to them, and which we say was a determination between the company and the city of the rates referred to in the contract. If this is true, [and whether it is or not, we shall consider further along,] then it follows from the agreed statement that it is in violation of the contract, if the contract itself is valid.

We do not deny that a contract of this character may agree upon rates so exorbitant that courts of equity would refuse to specifically enforce the contract, but this refusal would be put upon grounds not peculiar to contracts of this character, but applicable to all

alike, viz: that courts of equity will not decree the specific performance of hard and unconscionable bargains; but there is nothing in this case to show that this bargain is one of that character; and there certainly is no presumption in favor of it. It was deliberately entered into; the rates which it referred to were ascertained with still more deliberation, and agreed upon by the parties; and it would have to be an extreme case that would persuade a court of equity to refuse to enforce it under such circumsances, and certainly an extreme case that would incline a federal court of equity to refuse to accord to it the protection of the federal constiution.

It is well settled that in cases of this character, where the laws of a state have committed to a particular tribunal the power and duty of fixing rates, the courts will not interfere with its judgment, unless it is so unreasonable as to amount practically to taking private property for a public use without just compensation, or depriving one of his property without due process of law. It would not be enough to show merely that the profits derived were not such as, in the opinion of the court, one ought to derive from a business enterprise of such a character, for in such case, if any substantial profit is obtainable from the rates, courts do not substitute their judgment for that of the tribunal so empowered, so far as the amount of profit is concerned; hence if this bill had been framed upon the theory that these rates were unreasonable, it would have been necessary, doubtless, for the complainants to have shown such

a state of the case as we have here been referring to; but we say that is not the theory, and that there is a wide step between the lowest rate that might be fixed by the council that would not be interfered with by the courts, and a rate which amounted to a hard and unconscionable bargain; and the very object of the contract in regard to rates, is to protect oneself against the exercise of the almost unrestrained and unlimited liberty of judgment of the council or other tribunal which has the fixing of those rates; and courts of equity will interfere to protect such contracts unless some reason can be shown applicable to contracts generally why they should not do so.

III.

The contract of July 22nd, 1868, between the city and Griffin, Beaudry and Lazard is a valid contract.

(*a.*) The city had power to make the contract in the first instance. On March 11, 1850, the legislature of the state of California, passed an act to provide for the incorporation of cities.

See Statutes of Cal. of 1850, page 87.

By the second section of this act it was provided as follows:

"Whenever any city is incorporated by a special act of the legislature, such act may simply define boundaries of the city and declare it incorporated, in which case, it shall be deemed incorporated according to the provisions of this act; or may declare it incorporated under the

same with such changes as may be specially named."

Id.

At the same session of the legislature, the city of Los Angeles was incorporated by an act passed April 4, 1850, which act provided:

"Section 1. All of the tract of land included "within the limits of the Pueblo de Los Angeles "as heretofore known and acknowledged, shall "henceforth be known as the city of Los An- "geles, and the said city is hereby declared to be "incorporated according to the provisions of the "act entitled, 'An act to provide for the incor- "poration of cities, approved March 18, 1850', "provided, however, that if such limits include "more than four square miles, the council shall "within three months after they are elected and "qualified, fix by ordinance, the limits of the city "not to include more than said quantity of land, "the boundaries so determined, shall henceforth "be the boundaries of the city."

"Sec. 2 of the act simply provides the number of councilmen which shall be seven, and that the first elections should be held on the second Monday of the following May.

Sec. 3 provided that the corporation created by this act shall succeed to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred and the obligations created by the Ayuntamiento of said pueblo.

P. 155, Statutes of 1850.

Now in the act to provide for the incorporation of cities, which is thus made applicable to the in-

corporation of the city of Los Angeles, in Sec. 11, it is provided as follows:

"The said city council shall have power to "make by-laws and ordinances not repugnant to "the constitution and laws of the United States "or of this state, to prevent and remove nuisances, "* * * * to cause the streets to be cleaned "and repaired; to establish a fire department, to "make regulations to prevent and extinguish "fires * * *, to provide for the supplying "the city with water; to impose appropriate fines, "penalties and forfeitures for breaches of their "ordinances; * * * to erect and maintain "poor houses and hospitals; to prevent the intro- "duction and spread of diseases; and to pass such "other by-laws and ordinances for the regulation "of the police of such city as they shall deem "necessary; which by-laws and ordinances shall "be published in the manner to be prescribed by "the city council."

Such were the general powers of the city, and powers of the like character conferred upon municipal corporations have been many times held to be ample authority to contract for the supplying a city and its inhabitants with water, and to agree upon the price to be paid therefor.

See the opinion of Judge Wellborn, Tr. pp. 88 *et seq.* and the authorities cited; especially Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339; Illinois Savings Bank v. City of Arkansas City, 76 Fed 271.

In making a contract of this character the city is not exercising its governmental powers, but its business or proprietary powers. The

purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens.

Ill. Savings Bank v. City of Arkansas City. 76 Fed. 286.

In addition to the statutes referred to, the legislature, on May 3, 1852, passed an act entitled, "An act to provide for the incorporation of water companies. This act in its first section made the provisions of the statutes concerning corporations generally applicable to associations formed for the purpose of supplying any cities or towns, or the inhabitants thereof, with pure, fresh water, and the second section was as follows:

"Any company incorporated for the purposes "specified in the preceding section shall have "the right to purchase or take possession of and "use and hold such lands and waters as may be "required for the purposes of the company, lying "without the limits of the city intended to be "supplied with water, upon making compensation "therefor. The mode of proceeding to obtain "possession of such lands for the use of the "company, in cases where the parties cannot "agree upon a purchase for the use of the com-"pany, shall be the same as prescribed in sec. "17 and 18 of an act to provide for the incorpo-"ration of railroad companies, passed April 28, "one thousand eight hundred and fifty-one.

"Sec. 3. This act shall not give to any "company a right to supply any city with "water unless it shall be previously authorized "by an ordinance, or unless it be done "in conformity with a contract entered into be-

"tween the city and the company; any contracts "hereafter so made shall be valid and binding in "law, but shall not take from the city the right "to regulate the rates for water, nor shall any "exclusive right be granted by contract or "otherwise for a term exceeding twenty years."

Subsequently, on the 22nd of April, 1858, another act was passed, entitled, "An act for the incorporation of water companies." This act after making the act of April 14, one thousand eight hundered and fifty-three, and the provisions of an act entitled, "An act to ammend an act entitled, an act to provide for the formation of corporations for certain purposes," passed April 14, one thousand eight hundred and fifty-three, passed on the 30th day of April, one thousand eight hundred and fifty-five, applicable to corporations already formed or hereafter to be formed, under said acts, for the purpose of supplying any city and county or cities or towns, in this state, or the inhabitants thereof, with pure, fresh water, provided as follows, in section 2:

"Any company incorporated for the purposes "specified in the preceeding section shall have the "power to purchase or to appropriate and take "possession of and use and hold all such lands and "waters as may be required for the purposes of "the company, upon making compensation there-"for. The mode of proceeding, to appropriate "and take possession of such lands and waters "when the parties cannot agree upon a pur-"chase thereof, shall be the same as prescribed "in sections 27, 28 and 29 of an act to provide

"for the incorporating of railroad companies, "passed April 22, one thousand eight hundred "and fifty-three, except that such proceedings "shall be had before the county judge of the "county in which such lands or waters or both "may be situated: provided that all reservoirs, "canals, ditches pipes, acqueducts and all con- "duits heretofore built or that hereafter "may be constructed by any corporation, "formed under this act or claiming the privileges, "rights and immunities herein granted, or any "of them, shall be used exclusively for the pur- "pose of supplying any city and county, or any "cities or towns in this state, or the inhabitants "thereof with pure, fresh water."

Sec. 3 provided that all privileges, immunities and franchises that might thereafter be granted to any individual or individuals or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco or into any city or town in this state for the use of the inhabitants thereof, were thereby granted to all companies incorporation, or that might thereafter become incorporated, for the purposes aforesaid.

The fourth section declared that such corporation should furnish pure, fresh water to the inhabitants of such city and county or city or town for family uses so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and should furnish water to the extent of their means to such city and county or city or town, in case of fire or other great necessity, free of charge, and

the rates to be charged for water should be determined by a board of commissioners, to be selected, two by the city or town authorities, two by the water company, and in case the four could not agree to the valuation, then the four to choose a fifth, and if they could not agree, upon a fifth, the sheriff of the county should appoint him, and the decision of the majority of the board should determine the rates to be charged for one year.

As this act covers the entire ground of the incorporation of water companies, it might be doubted whether the act of May 2, 1852, is not repealed by it. But whether it was repealed or not, it had no application to this contract, for that act applied only to companies incorporated under that or some other act; but at the date of this contract, the Los Angeles City Water Company had not been incorporated at all, and the contract was made with Griffin, Beaudry and Lazard in their individual capacity. And even if there were any question upon the other score, the legislature of the state of California subsequently to the passage of the ordinance, of July 22, 1868, by which the city entered into this contract, ratified that ordinance. The act referred to was passed April 2, 1870, and is entitled, "An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles," and is as follows:

"Section 1. The following acts, contracts "and ordinances of the mayor and common "council of the city of Los Angeles are hereby "ratified and confirmed: The contract and

"lease for the care and maintenance of the Los "Angeles city water works, entered into and "made between the mayor and common council " of the city of Los Angeles on the one part, "and John S. Griffin, Prudent Beaudry and "Solomon Lazard on the other part, dated the "20th day of July, 1868, and also the ordinance "confirmatory of the same, passed July 22nd, "1868, which contract and ordinance are re- "corded in the office of the county recorder of "Los Angeles county in book 1 of miscel- "laneous records, pages 428-431; and also two "certain concessions from the said corporation "to William G. Dryden, his heirs and assigns, "concerning rights of way and water, and the "ordinances authorizing the same, passed "February 24, 1857 and December 8, 1857, "respectively, and recorded in the aforesaid "recorder's office, in book 2 of deeds, etc., at "pages 453 and 449 respectively; and a certain "conveyance to Hiram McLaughlin, his heirs "and assigns, from said corporation, dated "August 6, 1858, and recorded in said office in "book No. 4 of deeds, pages 225-226.

"Sec. 2. This act shall be in force from and "after its passage."

See statutes of Cal. 1869-70, pp. 635-636.

This ratifying act is set forth in the agreed statement of the facts.

Tr. p. 128, fols. 209-210.

At the same session of the legislature and on the 2nd day of April, 1870, the legislature passed another act published in the statutes of California of 1869-70, page 645, entitled,

"An act concerning water courses in the city of Los Angeles," the first section of which is as follows:

"The zanjas which are within the limits of "the city of Los Angeles, known as the prin- "cipal zanja, and zanjas No. 1, 2, 3, 4, 5, 6, 7 "and 8 are hereby declared public zanjas, and "the quantity of water which has heretofore gen- "erally flowed in each one of said zanjas is "hereby declared to be the quantity which by "right belongs to each one of said zanjas, and to "the farmers and fruit growers who are benefitted "by their use; provided always that nothing "herein contained shall be so construed as to "effect or in any manner interfere with any "rights, privileges or easements heretofore "granted and conceded to P. Beaudry, John S. "Griffin, Solomon Lazard, their associates or "assigns, by the mayor and common council of "the city of Los Angeles."

See also agreed statement of facts, par. 21, fol. 210.

On the 20th of February, 1872, the legislature of this state passed another act entitled, "An act to amend the charter of the city of Los Angeles," the second section of which is as follows:

"The mayor and common council of the city "of Los Angeles shall have full and complete "control and power over all zanjas, water courses, "water ditches and canals within the city limits, "except the rights, privileges and franchises "heretofore granted and now enjoyed by the Los "Angeles City Water Company, and shall have "power to take by purchase or otherwise land

"for the enlargement of the present zanjas, "canals, water courses and ditches to increase "the number and keep the same in repair, and "in all cases to regulate the use of the same un- "der such ordinances as the mayor and common "council shall prescribe; and provided further "that the privilege of water shall be extended to "the Agricultural Fair grounds adjoining said "city, to the same extent and under the like "regulations as to other irrigators using the same."

Statutes of 1871–2, p. 129, Sec. 2.

It will be remembered that the contract of Griffin, Beaudry and Lazard had been transferred to the Los Angeles City Water Company sometime before the passage of this act.

In 1874 and on March 26.

Statues of 1873-4, page 633, the legislature passed another act to amend the charter of the city of Los Angeles, and in the 28th section of the ninth article, it is provided as follows:

"All acts of the legislature relating to the "said city of Los Angeles and all city ordin- "ances heretofore passed, and now in force, and "not inconsistant therewith, shall be and re- "main in full force after this act takes effect, "and thereafter until repealed by the proper "authority; and all rights vested or liabilities "incurred under any former act of the legisla- "ture applicable to said city or any city or- "dinance, when this takes effect, shall not "thereby be lost, impaired or discharged."

Statutes of 1873-4, page 659.

On March 30, 1878, the legislature of said

state passed another act entitled, "An act to ratify certain contracts and ordinances of the council of the city of Los Angeles," the first section of which is as follows:

"Section 1: The council of the city of Los "Angeles is hereby empowered to contract for "the proper sprinkling of the streets of said "city, or for the supply of water for such pur- "poses, either with the Los Angeles City Water "Company or any other party, and is empowered "to provide for the payment of any compensa- "tion agreed or to be agreed to be paid for such "service, in the same manner that any other "expense on the part of said city is or shall be "provided for."

Statutes of 1877-8, page 849.

For the reference to the statutes in the stipulation, see Tr. Fols. 211-212.

Such is the history of the legislation of the state of California upon this subject. The ordinances of the Council adopted from time to time ever since the contract was executed, are equally explicit. By an ordinance passed June 6, 1879, and which was numbered 9, it was provided that all persons were prohibited from interfering with the free flow of the Los Angeles river, and in any way diverting it without permission of said Council, and a provision was contained in said ordinance providing for the punishment of its violation as a misdemeanor.

Tr. Fol. 212, Par. 26, page 130.

Another of the like character was passed on June 12, 1879.

Tr. fol. 213.

Yet it was also stipulated that the Los Angeles City Water Company has ever since its incorporation taken more than ten inches of water, measured under a four inch pressure, from the Los Angeles river, and has kept increasing the amount as the population increased until it amounts to 1000 or 1500 inches, measured under a four inch pressure, which, however, includes 650 to 690 inches by the underground excavations referred to. This leaves practically from 600 to 800 or 900 inches taken from the river at the present time, and no objection ever has been made to it by the city of Los Angeles until in 1896, and in the manner hereinafter referred to, so that it will be observed that these ordinances which prohibited the diversion from the Los Angeles river, passed as early as 1879, were not intended to apply and did not apply to the Los Angeles City Water Company, which continued to divert the water without any objection of any kind. For the stipulation in regard to taking the water, see

Tr. fols. 198-199.

On the 9th of August, 1887, seven years after the new constitution went into effect, the mayor and council passed a resolution by which it was resolved that there existed a necessity for the erection of one hydrant, for protection against fire, at 11 different points in the city, which were specified in the ordinance, and the second section was as follows:

"Sec. 2. That the Los Angeles City Water "Company, a corporation, as the successor and "assignee of John S. Griffin, Prudent Beaudry

"and Solomon Lazard, are hereby ordered to erect "or cause to be erected one fire hydrant for pro- "tection against fire at one corner of each of the "cross streets hereinafter named, that is to say, "at one corner of the intersection of corners "specified in Section 1 of this resolution, as pro- "vided by the agreement approved July 22, "1868."

See par. 28 of the agreed statement, Tr. fol. 213.

On February 17, 1896, the fire commissioners of the city made a report to the council calling the attention of the council to the fact that the City Water Company was then putting in water mains on South Hope and South Flower, and the committee requested that the council should order fire hydrants placed at the intersection of said streets with Ninth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Washington. The report was adopted. On the same day, Mr. Pessel, one of the councilmen, moved that the Los Angeles City Water Company be directed to lay a four inch main on Santee street between Ninth and Twenty-third streets, where there was not already a four inch pipe laid, and place fire hydrants at every other intersection on said Santee street, which motion was adopted.

Mr. Kingery also moved that the city clerk notify the water company to repair the fire hydrant at the corner of Pico and Pearl streets.

Tr. par. 30 Agreed Statement, fols. 214-215.

On the 23rd of February, 1897, the very day on which the ordinance attacked in this suit

was adopted, the fire and water committee reported, recommending that petition No. 139, from R. Zelner, et al, asking that a fire hydrant be placed on the corner of Oak and Washington streets, be granted, and the Los Angeles City Water Company instructed to erect said hydrant. This report was adopted. Then immediately afterwards, follows this ordinance fixing the rates at less than the contract price.

See par. 31, Agreed Statement, fols. 215-216.

At the same session there was another order to lay a four inch main on Hill street from Ninth to Lincoln, and place a fire hydrant at the corner of Moore and Lincoln street.

Id. fol. 260.

Now, these are merely samples. It is agreed that ever since the execution of the said instrument and the assignment to the Los Angeles City Water Company, that that company has been furnishing water to the city of Los Angeles for the public schools, city hospitals and jails therein, free of charge. It is agreed that they have done everything which that contract called for, except as modified by the subsequent agreement; that the company had acquired the system known as the Beaudry system and certain water rights in the Arroyo Seco, and the stock of the corporation known as the East Side Spring Water Company.

See Tr. fols. 194-196, par. 78 and 79 of the Agreed Statement. That ever since execution of the said instrument, bearing date the 20th of July, 1868, the Los Angeles City Water Company has made the said improvements and ex-

tensions and maintained the same at its own expense.

Par. 13, fol. 199, page 121.

It was agreed that the Los Angeles City Water Company began laying the 12 miles of iron pipe and the erection of the fire hydrants at one corner of each cross street, immediately after its incorporation, and it was continued by the said company until, at the time that this agreed statement was made, it had erected over 500 fire hydrants.

Tr. fols. 192-193, par. 4 and 5; that it erected the ornamental fountain and had constructed reservoirs used in connection with the water system, until there are now six; one of a capacity of 40,000,000 gallons; another of 15,000,000 gallons; another of 3,500,000 gallons; another of 6,000,000 gallons; one of 340,000 gallons, and one of 500,000 gallons. That they selected the place of diversion of the waters within 60 days after the making of the contract.

Par. 6, fols. 193-4.

The modification of the contract is agreed on and set forth at page 118.

The Los Angeles City Water Company took possession of the water works mentioned in the statement, and pursuant to the agreement, began to lay the pipes in said city, to furnish the inhabitants with water, as in the said instrument, provided, and to lay down the 12 miles of iron pipe in the city, for that purpose, and have ever since been extending the pipe system until there are now about 320 miles of pipe laid within

the city and used in the distribution of water for supplying the inhabitants of the city with water for domestic use, under said instrument.

Tr. fol. 192, page 117, par. 4 of agreed statement.

From these legislative acts, if there had been any lack of legislative authority in the city council to make such a contract in the first instance, this contract has been ratified by the legislature of the state; and even if that proposition were at all uncertain, the ordinances of the city, the conduct of both parties with respect to the performance of the contract, extending over almost the entire period of thirty years, it could not be now questioned by the city.

But this entire subject, the original power of the city to enter into such a contract, and the effect of the act of April 2, 1870, ratifying that act, is so fully treated of in the opinion of the learned judge of the Circuit Court, that we need only cite that opinion, and the authorities upon which it is based.

Tr. pages 88-104.

The court here added:

"These views render unnecessary the deter-"mination of the question of estoppel, reached by "the complainants in their last brief." But it is submitted that these various acts of the legislature and the acceptance of the charters by the city of Los Angeles that were thus framed, and by the various ordinances of the city, and the entire conduct of both parties, the city is estopped from challenging the authority of this contract at this late day.

In support of this proposition, we need only cite the case of the Illinois Trust and Savings Bank v. the City of Arkansas City,

76 Fed. 271, 293.

At page 293, the court said:

"There is another and conclusive reason why "the city cannot maintain any of the defenses it "has interposed in this suit. It is that it can- "not accept the benefits and repudiate the bur- "dens of its contract. It is that it cannot be "heard to deny the truth of the representations, "of the existence and of the execution of this "contract, which its records and its conduct "have constantly made, and in reliance upon "which, the gas company and the water com- "pany constructed and extended the waterworks, "and the bank and the bondholders loaned their "money. No principle is more universal in the "jurisprudence of civilized nations, no principal "is more equitable in itself, or more salutary in "its effects, than that no one may, to the dam- "age of another, deny the truth of statements "and representations by which he has purposely "or carelessly induced that other to change his "situation. This principle is equitable, because "it forbids the untruthful or culpably negligent "deceiver from profiting by his own wrong, at "the expense of the innocent purchaser or con- "tractor who believed him. It is salutary, be- "cause it represses falsehood and fraud."

Then follows a citation of authorities, and the court continues:

"This principle is as applicable to the transac- "tions of corporations as to those of individuals."

"As Mr. Justice Campbell well said in Zabriskie "v. Railroad Co., 24 How, 381, 400, 401, in "which the Supreme Court held that a corpora- "tion was estopped to question the validity of its "void guaranty, because it had permitted the "circulation of the bonds that carried it:

"A corporation quite as much as an individ- "ual, is held to a careful adherence to truth in "all their dealings with mankind, and cannot, "by their representations or silence, involve "others in onerous engagements, and then de- "feat the calculations and claims their own "conduct had superinduced."

Here follows the citation of many other authorities, and the Court further said:

"In a business transaction like that of per- "fecting the construction of water works and "the use of water for itself and its inhabitants, "a municipality is subject to this principle to "the same extent as a private corporation. The "same rule governs its business transactions "that governs the negotiations of private indi- "viduals and corporations."

This is followed by the citation of numerous cases.

76 Fed., 293-294.

There is not a single one of the defenses interposed in that case that might not have been set up with as good conscience as anything that is asserted here.

IV.

Passing now to the judicial consideration of this contract, its validity has been recognized by the Supreme Court of the state of California

as frequently as it has been acknowledged or recognized by the legislature.

It was before the Supreme Court of this state in

City of Los Angeles v. Los Angeles City Water Co., 49 Cal., 638.

The question there was whether the water company held an interest in the property under that contract, that was subject to taxation. The court held that it did.

(The name of the company is given in that case as the "City Waterworks Company," but that is a mistake.)

That case arose and was decided in 1875. It was again before the Supreme Court in

City of L. A. v. Los Angeles City Water Co. 61 Cal. 95.

In that case the question was whether the city of Los Angeles could impose upon the Los Angeles City Water Co. a license tax for doing business in the city in supplying the inhabitants with water. It had passed an ordinance for that purpose, and the Supreme Court held that the ordinance was void, that it was in violation of the contract.

It was again before the Supreme Court in

L. A. City Water Co. v. L. A. City, 55 Cal. 176.

The question there was as to whether the company was entitled to receive pay for water furnished for sprinkling streets. The learned judge, in delivering the opinion of the court, said:

"As I interpret the contract, the plaintiff was "only entitled to receive pay for water furnished "to the inhabitants of Los Angeles for domestic "purposes. Water taken for sprinkling the "streets was for the purpose of irrigation and "was not included within the lease of the city to "the company."

It has been before the Supreme Court of California but recently. The thirty years mentioned in this contract expired on the 22nd day of July, 1898. Prior to that time the city had announced its determination to take possession of the works and water system constructed by the Los Angeles City Water Company, claiming that this contract was merely a lease, that the time would expire on the 22d day of July, 1898, and that the city as a reversioner would be entitled to the possession, although it had neither paid the value of the property nor taken any steps to ascertain its value, or to provide the means of payment. The Los Angeles City Water Co. brought a suit to enjoin the city from executing this threat. As the city's intention was also to take a part of the Crystal Springs Land & Water Company's property, or the whole of it, that company also brought a suit to restrain the city from doing anything of the kind. About the same time, or a little after these suits were brought, the city brought a suit against the water companies, the object of which was in part to restrain the defendants from preventing the city from taking possession of the property, or preventing the city from collecting the rates, and also for the appointment of a receiver of the

property. These cases came up before the court on application of the various parties for preliminary injunctions, and for the appointment of a receiver, and they were all heard together, and on the 10th of September, 1898, the judge who presided in the Superior Court of Los Angeles county, made an order issuing a preliminary injunction at the suit of the Crystal Springs Land and Water Company and of the Los Angeles City Water Company, against the city, restraining it from taking possession of the property. It also refused an injunction in the suit brought by the city of Los Angeles, restraining the defendants from preventing the city from taking such possession, but it granted an injunction restraining the Los Angeles City Water Company from collecting the rates, and it also restrained the city from collecting the rates, but appointed a receiver, not of the whole property, but for the collection of these rates. All parties appealed to the Supreme Court of the state of California from these various orders. They were all heard together in the Supreme Court. On the 5th day of May, 1899, they were decided by the Supreme Court.

See City of Los Angeles v. L. A. City Water Co., et al., and all the other cases, 57 Pac. 210.

Every line and letter of this opinion assumes the validity of this contract. The court held that the city was not entitled to take possession of the property nor to collect the rates; and concerning the character of the contract, the court said:

"The city undertakes to contend that the "contract is a lease, a lease pure and simple; "and as the contract, according to the city's "contention, must be thrown into the category "of a lease, it contends for one of the well- "known features of a lease of land, to wit: that "at the expiration of the term, the lessor has "an immediate right of re-entry and possession. "This position is not tenable. The written in- "strument in question cannot be categoried into "any smaller class than that of a contract. It "is a contract with many and various coven- "ants. It was not called a lease, however sug- "gestive that might have been, by the parties "who made it."

57 Pac. 214.

Again, on page 215, "the contract in question "does not only require the lessor at the termin- "ation of the lease to pay the lessee the value "of the improvements, but it in effect entitles "the lessee to retain the ownership and posses- "sion until the lessor shall pay it therefor."

And the case of the

National Waterworks Co. v. Kansas City, 62 Fed. 853,

the opinion by Judge Brewer was cited as more nearly approaching this case than any to which attention was called, and it was approved by this court. A petition for rehearing was filed in this cause, and the rehearing was denied, but this opinion was in some respects modified.

See 57 Pac., 571,

but it is not modified in any respect that in any way assumes that the contract itself was

not valid. The conclusion of the opinion was that the orders appealed from in cases 657 and 658 were affirmed. Those were suits in one of which, the Crystal Springs Land & Water Company was plaintiff, and in the other the Los Angeles City Water Company. In No. 655, the appeal by the Los Angeles City Water Company and the other defendants, from the order appointing a receiver in the suit of the city, and enjoining the water company from collecting the rates, was reversed, and the order in the same case refusing to restrain the company from preventing the city from taking possession and management and control of the property, was affirmed.

57 Pac. 216.

All this could not have been decided—in fact, none of it could be decided upon any other theory than that the contract was perfectly valid.

We pass now to the objections made to this contract by the defendant.

V.

(a.) It is first claimed that there was no power originally in the city to enter into the contract. That we have already considered. It is next claimed that the legislature could not ratify it. This contention is based upon the following propositions:

The constitution of the state of California, adopted in 1849, and which continued to be the constitution of this state until the adoption of the new constitution in 1879, declared; corporations may be formed under general laws, but

shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

Constitution of '49, art. IV, sec. 31.

In S. F. v. Spring Valley Water works, 48 Cal. 493, the Supreme Court of California held that the legislature could not confer upon such corporations—that is private corporations—any powers or grant them any privileges by a special act, and that an act of the legislature which granted to individuals and their assigns certain powers and privileges, and then provided that the act should not take effect unless the persons to whom the grant was made should within a certain time, organize themselves into a corporation, under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed, and that such an act was therefore void.

Now the claim here is that this act of the legislature of California, April 2, 1870, ratifying the contract between the city and Griffin, Beaudry and Lazard, passed as it was after the company was incorporated, and after the assignment to it, comes within the principle of San Francisco v. Spring Valley Water Works; but the contrary has been decided by Judge Welborn, in the case,

See Tr. p. 97, *et seq*,

by Judge Ross in

Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 348,

and by the Supreme Court of California in

People v. Stanford, et al, 77 Cal. 371.

A claim was made in the court below that the grants of those franchises were taken by Griffin, Beaudry and Lazard merely as an evasion of the constitutional provision above referred to; but this proposition is absurd. In the case of

Telegraph Co. v. Alta Telegraph Co., 22 Cal. 398,

this question was decided exactly to the contrary of the ruling in San Francisco v. Spring Valley Waterworks. That case was decided before the contract between the city and Griffin and others, and that of San Francisco v. the Spring Valley Waterworks was not decided until July, 1874, about six years after the contract, and more than four years after the ratifying act. No question of this character ever occurred to anybody until long after the contract was made and ratified.

(*b*) It is also claimed in the court below that the Los Angeles City Water Company has been violating its contract by taking more than ten inches of water, measured under a four-inch, pressure, and for that reason is not entitled to enforce the contract; and furthermore that in the use of that water, as it is claimed not to be a use under the contract, the council had the power to regulate the rates for its use. But this claim has less foundation, if possible, than the other. The contract says nothing about water measured under a four-inch pressure; neither is there a limitation to ten inches under any measure. The language of the contract is, after granting the right to take water from the Los

Angeles river at a point above or near the present dam, as follows:

"Provided always that the said parties of the "second part, their heirs, executors, administra- "tors or assigns, shall at no time take from said "river, for the use of said water works, *more than "ten inches of water without the previous consent "of the mayor and common council of said city.*"

But it has been decided by the Supreme Court of California that that does not necessarily mean any quantity less than the amount which the city water company has ever taken.

In Dougherty v. Haggin, 56 Cal. 522, the plaintiff alleged that he was the owner and entitled to the use of 400 inches of water measured under a four inch pressure. The jury found in his favor, to the extent of 40 inches of water, miner's measurement. It was admitted that miner's measurement was not any certain quantity, that the custom of miners varied; and the Supreme court, in this case, said, that notwithstanding the plaintiff might not have owned more than 40 inches of water miner's measurement he might have owned more than 400 inches measured under a four inch pressure. Furthermore the establishment of the four inch pressure as the statutory measurement was not until 1872. The legislature adopted the codes in 1872, and they went into effect on the first day of January, 1873, in the main. In the Civil Code under the title of "Water Rights," it was provided that a person desiring to appropriate water, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four inch pressure.

Civil Code, sec. 1415.

Now that is the first time at which this measurement had the sanction of law, and which, as already stated, was four years after this contract was made. Therefore, it had no influence upon the minds of these parties in forming their ideas of what was meant by ten inches of water. But the agreed statement shows that it did not mean a four inch pressure. One of the agreed facts is that to supply the domestic wants of the people of the city of Los Angeles requires an inch of water, measured under a four inch pressure, to every hundred inhabitants.

Tr. fol. 199, page 120.

Now the inhabitants of the city were at the time of this contract, about 5000 or 6000 in number.

Tr. fol. 9,

and the population has increased until it now amounts to about 103,000.

Fol. 199.

That at the time of the signing of the contract, the territorial limits of the city embraced four square leagues in a square form, the center of which was the center of the old pueblo plaza; that in 1872 the limits were extended 420 yards to the south, and within the past three years, and prior to July 1897, the limits were further extended so as to take in between ten and fifteen square miles of additional and adjacent territory; that the company began to ex-

tend its pipes over the said additions to the city as the same were settled up and improved, and ever since has been and now is furnishing water to the people of the said district added to the original territory of the city, and did, upon the demands of the city council, erect fire hydrants within the said additional territory, and furnished water free of charge, and is in all respects continuing to lay pipes, erect fire hydrants and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city, etc.

Tr. fol. 226, par. 41 agreed statement.

It will thus be seen that it would have required from 50 to 60 inches of water, measured under a four inch pressure, to have supplied the inhabitants of the city for domestic use alone, at the time the contract was made; and this does not take into consideration the amount necessary to supply the city with water for municipal purposes. Furthermore it will be seen, by reference to the contract, that the two principalc onsiderations, indeed the only considerations, which the city received for this contract were the $8000 damages waived, the $1500 per annum (subsequently reduced to $400), the construction of a system of water works which it should have the privilege of purchasing at the end of the time, the laying down in the streets of 12 miles of iron pipe sufficient to supply the inhabitants with water for domestic uses, and the city with water for municipal purposes.

Tr. fol. 183,

the erection of this ornamental fountain,

Id.

and the extension of this system as fast as the needs of the city required it

Fol. 186

for the purpose of furnishing an adequate supply of water to the inhabitants of the city, as it then was, and as it might increase during the life of the contract.

With respect to the amount of the water, the city reserved to itself, in the contract, the right to furnish water for irrigation; and the rights granted by the city to Griffin, Beaudry and Lazard were not to interfere with this right reserved to the city.

Tr. fol. 187, pages 113 and 114.

Now it is stipulated that the city has always had flowing in the Los Angeles river at the point from which the Los Angeles City Water Company has always diverted water from said river, a quantity sufficient to have supplied the Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and that the city has never objected, up to October 20, 1896, to the said Los Angeles City Water Company taking as much water from said river as it might require for said uses.

Tr. fol. 224, par. 38.

The objection which the city made in October, 1896, here referred to, was the passage of a resolution by the council which ran to the effect that from that date, including the 22nd of

July, 1898, or until the further order of the council, the Los Angeles City Water Company and all other persons or corporations taking the water thereinafter mentioned, for the purpose of distributing or selling the same to the city of Los Angeles, be required to pay to the city an amount of money equal to 40 per cent of the gross rate received from the consumers, for rental thereof, etc., and that if the company did not agree to pay said rental, then that a suit should be brought to enjoin them from taking any more than ten inches, measured under a four inch pressure.

Tr. Fols., 220-223.

The company continued to take the water after the time mentioned, the same as before. It was further agreed between the parties that in the extension of the said system and the obtaining of an increased quantity of water, whenever such increase was made, it was necessary to supply the inhabitants of the city of Los Angeles with water for domestic use and furnish the city with water for municipal purposes, and that the company has, in meeting the wants of the city, among other things, purchased the system that was established by P. Beaudry, known as the Beaudry System of Waterworks, also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East

Side Spring Water Company, mentioned in paragraph X of the complaint.

Tr. Fol. 196.

Now all these things have been done, this enormous pipe system laid, reservoirs constructed, other systems, which either had failed or were on the point of failure, and which were supplying some portions of the city, purchased by the Los Angeles City Water Company, and connected with its own system, and the whole pipe system adjusted to the use of the water which had been diverted by means of this ditch, and to the extent of anywhere from 600 to 1000 inches, as the needs of the city required, in addition to the amount developed by the Crystal Springs Land and Water Company — all of which things were done with the full knowledge and acquiescence of the city, up to the period of less than two years before the thirty years expired. Expenditures running into the millions had been made in perfecting this system thus established, when the city council suddenly resolved, in October, 1896, that the company was to pay 40 per cent of the gross proceeds to it.

We have shown also that ten inches of water measured under a four inch pressure, was not in the minds of the parties at that time. We have shown that it was one of the contract obligations that the Los Angeles City Water Company was to supply the inhabitants with water and the city with water for municipal purposes. We maintain, therefore, that when these things have been done by one party with

the knowledge and acquiescence of the other; when it is admitted that over 500 fire hydrants have been erected, a large number of public buildings of various kinds constructed, consisting of school houses, jails and court houses, and the city have been supplied with this identical water through this system for all of its own purposes, not only in the original limits of the city, but throughout its extension since, we contend that this conduct amounts to an interpretation of the contract made by the parties themselves, and that where a contract is uncertain and indefinite—as this one certainly is, with reference to the amount of water to be taken, the courts will accept the interpretation that the conduct of the parties has put upon it.

Cent. Trust Co. v. Wabash R. R. Co., 34 Fed. 255-6.
McNeal v. Shirley, 33 Cal. 206.
Hill v. McKay, 94 Cal. 20.
Mulford v. LeFranc, 26 Cal. 108.
Pico v. Coleman, 47 Cal. 65.
Truett v. Adams, 66 Cal. 218.
Yocco v. Conroy, 104 Cal. 608.
Longbell Lumber Co. v. Stump, 86 Fed. 578.

and the city could not change this interpretation nor withdraw the consent thus constructively given, at least, after such an expenditure of money, and the construction of the works made with a view to the distribution of the water as provided in the contract. It was so held by the

learned judge in delivering the opinion in this case.

See Tr. pages 106-107,

and the cases there cited fully sustain that proposition. But in addition to that, in this same controversy between these parties, decided by the Supreme Court of California, 57 Pac, 210, the question was again raised, and that court held that looking at the context and the subject matter of the contract, it was quite evident that the parties did not mean only ten inches under a four inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract, it would have taken many times ten inches under a four inch pressure to furnish water for domestic purposes to the few thousand people who were then inhabitants of the city, and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for 30 years, from a flow of 10 inches, under a four inch pressure, would have been absurd.

57 Pac. Rep. 213.

We quote this further passage from the opinion of Justice McFarland, upon this subject:

"There is no pretense that the city ever ob-
"jected to the use of this water by the water
"company until 1896, when an ordinance was
"passed by the city government undertaking to
"withdraw the city's consent to the taking of
"more than ten inches from the river It is dif-
"ficult to imagine how this ordinance was passed

"seriously, for if the water company had been "prevented from taking from the river at that "time more than ten inches of water under "a four-inch pressure, there certainly would have "been a water famine in the city, for the city "had no works of its own, and no means what-"ever for supplying water for either domestic or "municipal purposes. But the city, having al-"lowed the water company for nearly thirty "years to divert the quantity of water above "mentioned, and to expend vast sums of money "upon the faith of the continuance of the right "to take said water, could not withdraw its con-"sent within the period of the contract."

"This same contention was made by the city "in the case of

"Los Angeles City Water Co. v. City of Los "Angeles, (U. S. Circuit Court, S. D. Cal.) "88 Fed. 745,

"but the court held otherwise. In that case "Wellborn, the learned judge holding the court, "said:"

And here follows a quotation from Judge Wellborn's decision upon that matter, which is obviously fully approved by the Supreme Court of California.

VI.

It is next claimed in the assignment of errors that the city was entitled to fix the rates because one corporation, the East Side Spring Water Company, was doing business here, and with respect to it the city did have the right to fix those rates. The city may have the right to fix any rates for any company not under any contract

relation with it, but the East Side Spring Water Company is shown by the stipulation, as already stated, to have been practically owned and absolutely controlled by the Los Angeles City Water Company. In truth, this system was a part of the Los Angeles City Water Company's system.

VII.

It is claimed that the city had the right to fix the rates because of the extension of the limits of the city beyond those in existence at the time of the contract. This also is already answered. Both parties interpreted the contract differently. The company was required to extend its pipes and did extend them into the annexed territory. It was required by the city itself to erect fire hydrants, and it did erect them in the same territory. Now the city had no authority to direct the Los Angeles City Water Company to erect fire hydrants or to do anything, except by virtue of the contract. The very order to erect the hydrants was a recognition of the contract and its obligations, and the erection of them was the acknowledgement of that obligation by the company. Such has been the interpretation of the parties, and if the interpretation were more doubtful than it is, it could not now be overturned; but in truth, there was no doubt about it, ever. The contract required the extension of the pipes as fast as the needs of the inhabitants required it, and it was not limited to any particular territory, but it was the inhabitants of the city who were to be supplied.

VIII.

It is further claimed that the acceptance of rates less than those fixed by the contract, by the company, for several years, estops it from insisting upon its rights under the contract; but this is a mistake. It is true that in 1880 or 1881, the city began to demand statements under this act of the legislature, passed in 1881, to carry into effect the constitutional provisions, and the city began fixing the rates. These rates were, for a considerable time, but slight deviations from those provided for in the contract. The history of these councilmanic proceedings will be found in the transcript,

Fols. 227-238,

But from the very beginning, the Los Angeles City Water Company was protesting against it. These protests are also set forth in the transcript,

Fols. 238-245.

This company was all the time protesting that the city had no right to violate this contract by fixing the rates at less than the contract price. Furthermore, they called attention to the fact continually, that under that contract they were not required to make these statements; and certainly there was nothing in the nature of an acquiescence, except it be in the fact that they did collect the rates so fixed. But the reasons for that are obvious. They were compelled either to bring a suit to set aside the ordinance or, if they charged any more, take the chances on a forfeiture of millions of dollars of property to the city, which

the city had agreed to pay for. In further answer to this claim, we contend that a contract in writing cannot be altered in this state, at least, except by a contract in writing, or by an executed parol agreement; and the Supreme Court of California has held that the acceptance of monthly interest at the rate of 8 per cent per annum waives the right to collect more interest for the months for which it was so accepted, but it does not waive the right to demand one per cent per month in the future, that being the contract rate.

Thompson v. Gormer, 104 Cal. 168.

In this case the court said:

"Under the principle of this section" (referring to the section of the Civil Code to the effect that a contract in writing cannot be altered except by a contract in writing, etc.) "the plaintiff was entitled to recover interest "at one per cent per month for the time during "which she refused to accept and did not accept "interest at 8 per cent per annum. She did not "contract in writing to change the interest as "expressed by the written terms of the note, "and her acceptance of the 8 per cent was of "no higher dignity than an express oral agree-"ment; but it was an executed agreement only "as to the months for which she accepted in-"terest at 8 per cent. As to the future, it was "executory."

Id. 170.

And the Supreme Court cited the cases of:

Erenberg v. Peters, 66 Cal. 114;

Taylor v. Soldati, 68 Cal. 127;

Simmons v. Hamilton, 56 Cal. 493.

In this case we could hardly have been said to have been accepting at all, for the company was continually protesting against it.

Erenberg v. Peters, 66 Cal. 114, was an action to recover rent due on a written lease. It will be remembered that the city in this case claims that the present contract is a lease; but the oral agreement was there held not executed, and therefore that it did not change the written contract.

IX.

It is claimed that this contract was void because of the grant of what is claimed to be an exclusive franchise, and which is supposed to be in violation of the statute of May 2, 1852, hereinbefore referred to. To this we answer, it is doubtful whether the provision referred to can be called a grant of an exclusive franchise at all. It will be seen that the city of Los Angeles claimed large rights in the waters of the Los Angeles river. It claimed to have certain waterworks at that time. They consisted of wooden pipes laid in the streets, and some other works, all of which were to be replaced with a better system. It granted the right to take this water from the river, turned over such waterworks as it claimed to have, to be used by Griffin, Beaudry and Lazard, until the substituted works were constructed, and there was this clause:

"And the said party of the first part hereby

covenant and agree to make no other lease, sale, contract, grant or franchise, to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes, during the continuance of this contract, always without prejudice to any rights already granted.

Tr. fol. 6.

Now this may be very fairly construed as applying to the property which the city either owned, or claimed to own, and which was there granted. And certainly if the city is the owner of the waters of the Los Angeles river, it is not in the nature of a grant of a monopoly or exclusive privilege, to say, that having given to one party the right to take water to the extent necessary to supply the inhabitants of the city, or to any other extent for that matter, that it will not grant to any other person another right to take the water of the river; that is, it would not lease or license anybody else to take its own property, and engage in the same business. But if it be construed to be an exclusive privilege, still the inhibition came from a legislative act, and the legislature could repeal it; and having ratified this particular contract, it did repeal it, so far as this company was concerned, if the repealing act was valid.

It is here that the counsel for the city contend that this provision of the constitution of 1849 was violated, but as is shown by the learned judge of the court below, that statute was an act providing for the incorporation of water companies, and the third section declared that

the act should not give to any company the right to supply any city with water unless it shall be previously authorized by ordinance, or unless it be done in conformity with a contract entered into between the city and the company. Any contracts hereafter so made shall be valid and binding in law, but shall not take from the city the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise for a term exceeding twenty years. These provisions, therefore, were directed against contracts between a city and a company incorporated under its provisions, and it had been held by Judge Ross that that provision had no application to the parties to whom the grant in that case is made, for the reason that they were not incorporated under that or any other act.

Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 348-9.

We say Griffin, Beaudry and Lazard were not incorporated under any act, much less under this act of May 3, 1852.

See Judge Wellborn's opinion, Tr. pages 97-8.

It therefore follows that there was nothing in this act that limited the general powers of a city to enter into a contract with Griffin, Beaudry and Lazard, and hence, we say again that the contract was originally valid without any ratification. But the ratifying act does not come within the inhibition of the constitution of 1849 at all. As already stated, that provision prohibits the creation of corporations by

special act, except for municipal purposes; and until the adoption of the new constitution, there was never any limitation upon the power of the legislature to create municipal corporations by special act, and indeed, they were nearly all of them so created. Now the act of 1852 is not a limitation upon the powers of private corporations, but upon the power of the municipal corporation. The act did not confer the right upon a company to supply the city with water unless the city should previously authorize it by an ordinance, or it be done in conformity with the contract between the city and the company Those contracts were declared to be valid and binding in law; but the limitation was that it should not take from the city the right to regulate rates, nor should any exclusive right be granted (by the city of course) by contract or otherwise, for a term exceeding twenty years. This we say was a limitation upon the power of the municipal corporation to grant--not upon the power of the company to take by grant. Hence, if the company had been incorporated when the contract was made, the ratification act, though special legislation, did not come within the Spring Valley Waterworks case, for it simply enlarged the power, or made valid the exercise by the city of a power, which was previously forbidden to the city; and as the legislature could have created the municipal corporation by a special act, and by similar acts could have invested it with any power that it saw fit, the ratification act was valid.

Furthermore, if this were a grant of an exclusive franchise and if it were void beyond the period of twenty years, this does not make the whole contract void.

Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed. 279-284.

At the pages referred to is a general discussion of this question of whether the invalidity of one provision in a contract renders the whole contract void, and numerous authorities are cited. It is submitted that the principle which governs the question is that unless the void provision is such that it could not be supposed that the contract would ever have been entered into at all without it, the invalidity of one clause of a contract does not render the entire contract void, but we quote especially this passage from that opinion:

"Moreover the city is in no position in this "case to insist upon the invalidity of the ex- "clusive character of this grant, if that could "avoid its entire contract. The city is not en- "deavoring to construct water works or to lay "pipes in its streets in violation of its exclusive "grant to the gas company, nor is anyone at- "tempting to do so under its license or by its "permission. No one seeks to infringe this ex- "clusive grant. In practical effect, it stands "unchallenged, and may ever continue to do so "until it is challenged by the act or endeavor of "some one who seeks to infringe it. Its invalid- "ity or validity is a moot question on account of "which the courts ought not to and will not "avoid any part of the contract. No one who

"does not infringe or threaten to infringe the "exclusiveness of a grant in a contract made by "a municipality can, after the substantial per- "formance of the contract by the grantee, be "held to say that the contract or grant is void "on account of the exclusive character of the lat- "ter."

Id. 281 and authorities cited.

Every word of this applies to the present case; and so with respect to the contract in regard to the rates; even if it were void, it would not avoid the entire contract, though to be sure that question might be a more serious one in the present suit, since the very object of the city is to enforce that part of the contract.

X.

It was claimed by the counsel for the city, on the demurrer to the bill, that there was an improper joinder of parties defendant. Suits of this character are substantially against the municipality, especially under the new constitution of California, under which, when a forfeiture accrues for overcharging rates, it accrues to the city. It has therefore, in its municipal character, a direct interest in the question of whether we can or cannot charge above the contract. In practice, in this state, it does not appear to have been considered very material whether the legislative body alone was sued, or the city alone, or both. In the Spring Valley Waterworks v. City and County of San Francisco, *et al.*,

82 Cal. 286,

while the report of the case does not show who the other defendants were they were in fact the

Board of Supervisors of the city and county of San Francisco; and in the case of

Jacobs v. Board of Supervisors of the City and County of San Francisco, *et al.*, 100 Cal. 121,

the other party there was the city and county of San Francisco. In the Spring Valley Waterworks v. the City and County of San Francisco, 52 Cal. 111,

the suit was against the city alone; but it was an application for a writ of prohibition seeking to restrain legislation pending before the board of supervisors, the threatened ordinance being one commanding the mayor to cause connections to be made with the pipes and mains for the purpose of taking water for the city for municipal uses without paying therefor. In the case of

Spring Valley Waterworks v. Bartlett, Mayor, *et al.*, 16 Fed. 615,

Judge Sawyer, delivering the opinion, said:

"I suppose this bill might just as effectually have been filed against the city and county of San Francisco, without making the mayor and the supervisors individually parties at all, but the injunction would operate upon them as agents and servants of the corporation.

Id. 622-623,

Such has been the practice in this state. The mayor is not a proper party, for it has been decided that under the new constitution of this state, it is the board of supervisors or the town

council alone that is invested with the power of fixing those rates.

Jacobs v. Board of Supervisors, 100 Cal. 121.

XI.

It was claimed in the court below that this bill could not be sustained because there was an adequate remedy at law. The argument is that the ordinance, if it be void, is void on its face, and therefore under a well known principle of equity, a court of equity will not interfere. The case of Spring Valley Waterworks v. Bartlett, 16 Fed. 615, was mainly relied upon to sustain that proposition. The opinion of Judge Wellborn fully refutes the contention here made, and shows that the case does not fall within the rule laid down in the decision just referred to, because this ordinance was not void on its face. The ordinance, indeed, is apparently valid. It requires the production of the contract between the city and the Los Angeles City Water Company to show its invalidity as to this company. However, the case would not fall within the principle anyhow. In the agreed statement of facts in this case, it is shown that "there were probably 15,000 houses in the city of Los Angeles at the time this case was tried. The complaint shows the growth of the city from a village of from 5000 to 6000 inhabitants to a town of over 75,000 as stated in the bill, 103,000 in the agreed statement of facts. It has been decided in many cases that to exclude the jurisdiction, of the courts of equity, the remedy at law must be as complete and adequate

as the remedy in equity. It is evident that the right of the company to collect the contract rate could, independently of setting aside this ordinance, be enforced in only two ways: one by suit against each individual, which it is obvious would be no remedy at all, since the cost of it would be ten times the amount of the rates. The other would be by taking the matter in the company's own hands, and shutting off the water for the non payment of rates; but this is not the pursuit of a remedy in any court, either of law or equity. It is righting one's wrongs by one's own hands. That is not the sort of a remedy that should exclude the jurisdiction of a court of equity. One who undertakes to redress his own wrongs assumes all the perils that may result from a mistake, and especially in a case where, as here, if the company should prove to be mistaken as to the validity of this contract, and its rights under it in the face of these constitutional and legal enactments, the penalty is the forfeiture of its entire works to a municipality that would be only too eager to enforce that forfeiture. Furthermore, in the very case referred to of Spring Valley Waterworks v. Bartlett, Judge Sawyer manifestly came to the conclusion that he did, very reluctantly, and himself delivered a most forcible argument against that determination. Besides, by the very cases cited by Judge Sawyer, as well as by the argument, it is evident, that the precise ground upon which the decision was put was that if the 14th article of the constitution was void because in conflict with

the constitution of the United States, that anything done under it would necessarily be void. Now that suit was brought to enjoin the municipal authorities from passing an ordinance. It may be doubtful whether courts of equity would enjoin the exercise of legislative power at all, but certainly there would be far more reason for refusing to restrain the passage of an ordinance fixing rates, which is the exercise of legislative power, when the very claim was that the ordinance if passed would be void, than there would be if the ordinance were actually passed and attempted to be enforced, or the party placed in such a position that he must either yield obedience to the ordinance, or find his property forfeited. These same considerations too, fully explain the conduct of the Los Angeles City Water Company in submitting to the collection of rates fixed at less than the contract rates, for so long a time. When the first departures were made from the contract rates, the differences were not very great, but each year the rates grew less and less, and the nearer the end of the thirty years approached, the greater were the reductions made by the council. All this time they had no choice but to submit, bring a suit, or take the chances of the forfeiture of their property, if they collected more than those rates, from a single individual. Injunctions have been issued and ordinances vacated by the courts in just such cases, and in many instances.

Co. of Mobile v. Louisville & Nashville R. R. Co., 84 Ala. 115.

Same case, 5 AM, State Rep. 342.

Reagan v. Farmers Land & Water Co., 154 U. S. 362.

Pennoyer v. McConnaughy, 140 U. S., 1.

That was a suit against a board of land commissioners of the state of Oregon to restrain them from doing certain acts under an act of the legislature of Oregon, looking to the disposition of certain lands. The ground upon which the injunction was sought being that the lands had already been disposed of by the state of Oregon, and the plaintiffs were the owners of part of them. The jurisdiction of the Federal Court was sustained principally upon the ground that the statute was unconstitutional which undertook to dispose of lands a second time, and that in such a case equity would interfere by injunction.

XII.

Another objection made in the court below to any relief here was that the ordinance would, by its terms, expire in a year. That a decision could not be reached here in a year, and hence that the annullment of the ordinance would be ineffective. If this were any reason for refusing the relief, then it would follow that no one ever would be entitled to any remedy in any court against such action, whether it be in violation of a contract, or whether it simply fix the rates so low as virtually to deprive one of his property without due process of law. But courts do entertain bills of this character, and they have been sustained by the Supreme Court of California, notwithstanding that at the time

the decision was given the year had already expired.

San Diego Water Co. v. City of San Diego, 118 Cal. 556.

Judge Van Fleet, in stating the case, says: That in February, 1890, the common council of the city passed an ordinance fixing the water rates for the year beginning July 1st, 1890. In May, 1890, the plaintiff brought this action against the city, the common council, the mayor and the individual members of the council, to annul this ordinance, and enjoin its enforcement.

118 Cal. 562,

The case was decided in bank, October 9, 1897.

Id. 556.

Further along on page 562, Justice Van Fleet says:

"The action was tried after the expiration of "the year in question and a judgment was entered "declaring the ordinance to be void, and setting "the same aside. From this judgment and "from an order denying their motion for a new "trial, the defendants appealed."

Id. 562.

The Supreme Court having reached the conclusion that the court erred in the course of the trial of the cause, reversed the judgment denying a new trial, and remanded the cause for a new trial.

Id. 577.

Justice Garoutte concurred specially and con-

cluded that the judgment and order should be reversed and the cause remanded.

Id. 584.

Justice Temple concurred and agreed generally in the views expressed by Mr. Justice Garoutte.

Id. 584.

Justice Harrison also concurred.

Id. 586.

The only disenting opinion was that of Chief Justice Beatty, and he was of the opinion that the judgment and order should be affirmed.

Id. 588-9.

that is, the judgment setting aside the ordinance. Now this was seven years after the ordinance was passed, and more than six years after it had expired.

Besides Judge Wellborn's opinion here was delivered within a year, if that would make any difference; and if correct when it was given, it does not become error because the year has expired since.

XIII.

The evidence fully sustains the decision of the court below, that the parties did, subsequently to the making of the contract, mutually agree upon the rates charged in 1868, at the time the contract was made.

It is claimed in this case that there was no evidence introduced to support the claim that the city and the company had gotten together and agreed upon the rates that were charged in 1868, and made them the basis of the rates to be fixed under the contract. This matter has also

been specifically determined against the appellant by the Circuit Court.

See Tr. page 106.

Certainly this finding would not be disturbed except where there was no evidence to support it. We have already cited the paragraphs of the agreed statement of the facts wherein is set forth the proceedings of the council and the company in this matter.

See Tr. fols. 200-209, par. 15-18 of the agreed statement.

We will not extend this brief by considering these facts in detail, the substance of which is, that the city appointed two and the company two persons to fix the rates for water. This first consultation was in April, 1870. It is true that at that time the law provided that the rates should be fixed by just such a committee, but it could scarcely be denied that the same committee would be a very appropriate one to ascertain what the charges were which under the contract were to be fixed. Now that this is what they did do will appear from the following passages from the folios already cited:

"The undersigned commissioners duly "appointed on behalf of your honorable bodies, "to adjust, fix and establish the *rates and* "*charges of the Los Angeles City Water Company* "* * * respectfully report that they have "established water rates and charges for do- "mestic purposes, taking as a guide, as near as "can be, the charges and rates for domestic "purposes charged in July, 1868."

Fol. 201.

It will be seen that the ordinance was not fixing the rates for any other company than the Los Angeles City Water Company. These rates so fixed were established and confirmed in 1871.

Tr. fol. 205.

In August, 1874, the ordinance regulating the rates, declared in section 1, that:

"By virtue of the authority vested in and re-
"tained by the mayor and common council of
"the city of Los Angeles, by law. and by the
"provisions of the contract and agreement
"made and entered into between said municipal
"corporation, as party of the first part, and
"John S. Griffin, Prudent Beaudry and Solomon
"Lazard, and their assigns, of the second part,
"said contract dated the 20th of July, 1868,
"and approved July 22nd, 1868, it satisfactorily
"appearing that the above mentioned parties of
"the second part have duly assigned their
"rights and privileges under said contract to
"the Los Angeles City Water Company, the
"following schedule is adopted and established
"as the water rates to be charged by the said
"water company."

Tr. fol. 205-½.

It is submitted that it does appear from the evidence that they were having direct reference to this contract, and that their business was to ascertain as nearly as possible the rates which were charged at the date of the contract. It is further said by the counsel for the appellant that the ordinance attacked here fixes rates for many purposes other than those which were

contained within the contract, and hence that it had the right to fix the rates; but it is conceded in the stipulation that if the rates established in 1870, and which we say were the rates agreed by the parties to be the contract rates, were collected for the year beginning July 1st, 1897, and ending June 30, 1898, the company would receive $50,000 more than it will under this ordinance.

Tr. fol. 217, par. 33.

See also par. 444, II, fol. 216.

Now this, of course, has reference to the rates for those services which are provided by the contract.

Besides that, here again, the parties have put their construction upon the contract, and indeed the contract itself plainly includes within its domestic rates and domestic uses, all purposes other than irrigation. That is what the company was excluded from, and nothing else. But when the main service of the company—the main source from which nine-tenths of its revenues are received, is the domestic use, properly so-called; an ordinance which deprives them of $50,000 and more, which they ought to receive, under the contract, is void altogether.

XIV.

We finally bring before the court one further consideration bearing upon the questions involved in this case: When the new constitution was adopted the method of fixing the water rates remained the same that was provided by the statutes of 1858. The company chose two members of a commission, the legislative body of the

city two, they four the fifth, if necessary, and the rates were established by this commission. The constitution of 1879 declared that the rates for water furnished to the inhabitants of the city and to the city, should be fixed by the council or other governing body of the city. Under the previous acts corporations were required to furnish water for extinguishing fires and other municipal uses, free of charge. The new constitution and statutes passed in pursuance of it were both assailed as unconstitutional, upon the ground that this change in the mode fixing the rates was a law impairing the obligations of contracts; in other words, claiming that the mode of fixing the rates was a part of the contract, express or implied, for supplying municipalities with water. The Supreme Court of the state held that it was not a violation of contracts (having no special provision in the contract with reference to fixing the rates), that this commission for fixing water rates, whatever it might be called and however chosen, was the mere agency of the government and that the government could change its agents for that purpose at any time that it saw fit, and that there was no vested contract right for the continuance of this particular tribunal for fixing the rates.

Spring Valley Waterworks v. Board of Supervisors of San Francisco, 61 Cal. 3.

But as a result of this decision it was subsequently held that the provision of the act of April 22, 1858, for the incorporation of water companies requiring them to furnish water, free of charge, to cities and counties, cities or towns,

for certain purposes, was abrogated by the new constitution.

Art. XI, Sec. 19 and Art. XIV. Sec. 1.

and such companies are now relieved from any such obligation.

The provisions of Art. XIV we have already quoted. Sec.19 of Art. XI,is simply to the effect, that in any city where there are no public works owned and controlled by the municipality for supplying the same with water,or artificial light, any individual, or any company, duly incorporated for such purpose, under and by authority of the laws of this state, shall under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light or with fresh water for domestic and all other purposes, on condition that the municipal government shall have the right to regulate the charges therefor.

The decision here referred to is

Spring Valley Water Works v. Board of Supervisors of the city and county of San Francisco, 61 Cal. 18.

The various provisions of the new constitution were held to establish the universal rule that it was incumbent upon the governing legislative

body of the city to fix the rates to be charged for the use of the water for all purposes, and among other things, it was said in that case by Chief Justice Morrison:

"It seems to me that the decision in the above "case (the one already referred to, holding that "the rates were to be fixed as prescribed in the "constitution) has a bearing upon the case now "under consideration, for, if the constitution took "from the water company the privilege of hav-"ing a voice in fixing the rates, it might charge "for water supplied, it also relieved the company "of the duty of supplying water to the city for "any purpose free of charge. The consideration "for the duty imposed upon the company to sup-"ply free water, was the privilege conferred by "the same section, of the act, upon the company, "to participate in fixing the water rates. The "duty and privilege were correlative, and when "the privilege was taken away, the correspond-"ing duty ceased to exist."

Id. 27.

The Chief Justice added, however, that he was not obliged to rely upon that line of argument and that the plain language and obvious intention of the constitution forced him to the same conclusion.

Id.

We have already called attention to the stipulation,

Par. 7, page 118 of the transcript

that the said Los Angeles City Water Company has been, ever since the execution of said instrument and the assignment, furnishing water

to the city of Los Angeles for public schools, city hospitals and jails therein, free of charge, and also that it has performed its contract in regard to the erection of fire hydrants, and that during all of the time that the company has furnished the city of Los Angeles with water for the extinguishment of fires, free of charge.

Tr. fol. 193, par. 5.

It has been now nearly twenty years since the decisions of the Supreme Court of this state, that under the new constitution, there is no obligation upon water companies to furnish municipalities with water free of charge for any purpose; hence it has clearly been the understanding, both of the city of Los Angeles and of the Los Angeles City Water Company that the contract relation between them fixed a different rule for their government.

We offer an apology for the length of this brief, but as it was begun in advance of any brief on behalf of the appellant, so we have been compelled to close it without knowing exactly what we shall have to encounter, and as it has been anticipated by both parties that we should probably submit it upon briefs, we deemed it the part of prudence to notice all of the points that occurred to us might be made by our adversaries.

We respectfully submit that the decree should be affirmed.

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J. S. CHAPMAN,
Of Counsel.